Supreme Court, U. S.
FILED
AUG 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. ~~78-245~~

LEHIGH LUMBER COMPANY, INC.,
Petitioner,

v

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. _____

LEHIGH LUMBER COMPANY, INC.,

Petitioner,

v

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Lehigh Lumber Company, Inc., your Petitioner herein, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 16, 1978.

OPINIONS BELOW

The Judgement Order of the United States Third Circuit Court of Appeals made without benefit of opinion is printed in the Appendix hereto, infra page 1 . The Decision and Order of the National Labor Relations Board appealed from is printed in the Appendix hereto, infra page 2.

JURISDICTION

The judgement of the United States Court of Appeals for the Third Circuit was entered on May 16, 1978. A timely Motion for a Trial De Novo and Stay of Enforcement Order was denied on June 12, 1978.(Appendix, infra,page 4)
The jurisdiction of the Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTION PRESENTED

Whether the General Counsel of the Board met its burden of proof of any majority status of a union by offering and relying thereupon a labor contract, unlawful on its face, void ab initio and in its entirety without any saving or separability clause contained therein in a proceeding which became the basis for a Board order to bargain with a minority union where a prior valid representation question was raised by both the employees and the employer.

STATUE INVOLVED

The National Labor Relations Act, as amended 61 Stat. 136. 29 U.S.C.A. Sections: 157
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing (emphasis added), and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain (emphasis added) from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

158 (a) (3)
by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning

of such employment or the effective date of such agreement, whichever is the later, (i) if any such labor organization is the representative of the employees as provided in section 9(a), (emphasis added) in the appropriate collective-bargaining unit covered by such agreement when made...

158 (b) (1) (A)
It shall be an unfair labor practice for a labor organization or its agents(1)to restrain or coerce(A)employees in the exercise of the rights guaranteed in section 7:(emphasis added). . . .

159 (a)
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees(emphasis added) in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit...

STATEMENT OF CASE

Your Petitioner was charged by a union[1] with unfair labor practices on August 9, 1976, after the union learned that your Petitioner's employees had filed a petition for a certification election.[2] The

1. Teamsters Local No. 773
2. Although your petitioner voluntarily recognized the union as a minority union and bargained with them as a member of an employer's association until the association dissolved on August 1, 1976, the union was not ever certified to represent your Petitioner's employees at any time.

Charge blocked the election per Board[3] policy. Your Petitioner also petitioned for an election during November 1976. To date no election has been held to determine the majority status of the union.

From Complaint issued on November 19, 1976, and hearing held on January 20,1977, your Petitioner appealed to the Board on May 17, 1977. The Board issued its Decision and Order on July 25, 1977.

Pursuant to Section 10 (f) of the National Labor Relations Act, as amended, hereinafter the Act, your Petitioner filed a Petition for Review of the Board's final order with the United States Court of Appeals for the Third Circuit on August 18, 1977. Upon denial of review by that Court on May 16, 1978, and enforcement of the Board's order on June 7, 1978, your Petitioner filed a timely Motion for a Trial De Novo and Stay of Enforcement Order which was denied on June 12, 1978.

Thereafter your Petitioner requested a Stay Pending Review on Certiorari from Mr. Justice William J. Brennan, Jr. Said request was denied on July 21, 1978, and the instant Petition for a Writ of Certiorari was filed.

REASONS FOR GRANTING WRIT

Your Petitioner was ordered by the Board to bargain with a minority union against the wishes of all of its employees not-

3. The National Labor Relations Board.

withstanding the mandate of Section 9(a) of the Act which requires majority status as a prerequisite to any demand by a union to represent or bargain for your Petitioner's employees.

Contrary to the Act, the General Counsel of the Board erroneously relied in toto upon a pre-existing void labor contract to prove that the union possessed the requisite majority status concerning your Petitioner's employees.

Said contract was void ab initio because it contained an unlawful union security clause[4] which required union membership prior to the statutory 30 day period and because it purported to apply prior to the effective date of the contract. In both of the above instances the Board uniformly finds the entire contract void ab initio, Paragon Products Corp., 134 NLRB 662 (1961)

As the moving party said burden of proof was upon General Counsel to establish on the record the majority status of any union demanding to bargain or entitled to bargain with your Petitioner, Fort Smith Outerwear, Inc., v NLRB (CA8, 1974) 499 F2d 223; Fuqua Homes Missouri, Inc., 201 NLRB 130 (1973).

The only fact established on the record by General Counsel was that the labor contract violated Section 8(A) (3) of the Act and that said contract and unlawful union security clause acted as an unlawful restraint upon your Petitioner's employees' free choice of a bargaining representative

4. Article 4 Union Membership, Para. 2, Appendix page 4.

contrary to Section 7 of the Act, Santa Fe Trail Transportation Co., 139 NLRB 1513(1962); Standard Molding Corp., 137 NLRB 1515 (1962).

The labor contract contained an important and indispensible void union security clause which permeated the entire contract and indeed provided the very basis for the union to demand to bargain in the first instance. This void union security clause was the very clause relied upon by the General Counsel to attempt to establish majority status of the union. The instant issue concerning the existence of any bargaining status of the union to enable it to represent your Petitioner's employees is directly and inextricably involved with said clause and its effect upon the whole contract. Moreover, the void contract did not contain any severance or any separability clause, NLRB v Rockaway News Supply Company, Inc., 73 S.Ct.519, 345U.S. 71, 97L. Ed. 832 (1953). Thus the purpose for which the unlawful labor contract was introduced by General Counsel must fail for lack of proof of any majority status of any union.

It is essential that your Petitioner and its employees are entitled to the same treatment under the Act that the Board affords to an outside union in "contract bar" situations wherein the Board will order an election upon petition of an outside union whenever the Board determines that a pre-existing labor contract contains an unlawful union security

clause which voids the entire agreement. Paragon case, Standard Molding case, supra. The patent effect thereof is to deny an incumbent union any majority status until proved by a duly held certification election provided for under Section 9 of the Act.

The Act under Section 9 (a) mandates majority status as a prerequisite to any bargaining obligation. The Board failed to establish any union majority status by its proof and in juxtaposition to requests by both your Petitioner and its employees[5] for a Board certification election.

It is therefor urgently important to not only your Petitioner but to all other employers in like circumstances whose employees reject a union that the Board orders their employer to bargain with based upon the erroneous proof offered by the General Counsel of the Board of the majority status of said union founded upon a void labor contract which contains on its face an unlawful union security clause but does not contain any saving or separability clause.

Much confusion has resulted concerning the effect of invalid union security clauses upon the majority status of the incumbent union because of the Board declaring the whole labor contract void ab initio in some instances and refusing to do so in other instances including the instant case. Compare NLRB v Martin Bldg. Material Company,(CA5,1970)431 F2d1246:

5. Employees as used in this Petition represent permanent replacements who are being repeatedly harassed by the union, a condition which has lasted for more than two years without relief.

Mc Leod v United Brotherhood of Industrial Workers (CA2,1961) 288F2d 198; Paragon case; Standard Molding Case, supra, with Rockaway News Case supra; Re Port Pub. Co.,57 S.E.2nd 366, 231 N.C.395, 14 ALR 2nd 842 (1950); Pine Transport, Inc., 197 NLRB 43(1972).

Clearly, justice and fairness and certainty of the law require that the Board equally apply the statute to all parties concerned. If the Board interprets a labor contract as void ab initio and in its entirety as to one party eg. an outside labor union, then the law requires that it apply the same interpretation to all other parties eg. employers and employees including your Petitioner. It must be decided by this honorable Court what uniform effect under the Act is to be applied by the courts and the Board to a labor contract unlawful on its face because it contains a clearly unlawful union security clause without any saving or separability clause therein.

None of these employees were involved in the charge filed by the union and are without any knowledge of it.

CONCLUSION

WHEREFORE, your Petitioner, Lehigh Lumber Company prays that for the reasons outlined above, this petition for a writ of certiorari will be granted.

Respectfully submitted,

August 11, 1978 — Louis Martin Busch

DATE

LOUIS MARTIN BUSCH, ESQ.
Counsel for your Petitioner
74 Cherry Lane, R. D. 2
Macungie, Pa., 18062

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-2076

LEHIGH LUMBER COMPANY, INC.
Petitioner

V.

NATIONAL LABOR RELATIONS BOARD,
Respondent

LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board
Entered July 25, 1977

Argued May 4, 1978

Before: ADAMS, VAN DUSEN and ROSENN, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by Petitioner, it is

ADJUDGED and ORDERED that the application for review is denied; and enforcement of the National Labor Relations Board is hereby granted.

Certified as a true copy and issued in lieu of a formal mandate on June 7, 1978.
Test: THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit
BY THE COURT,

Adams
Circuit Judge

ATTEST:

Copy

Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: May 16, 1978

230 NLRB No. 164

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEHIGH LUMBER COMPANY
and
BROWN-BORHEK COMPANY
and
LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Case 4-CA-8147

DECISION AND ORDER

On April 26, 1977, Administrative Law Judge Irwin Kaplan issued the attached Decision in this proceeding. Thereafter, the Respondent Lehigh Lumber Company filed exceptions and a supporting brief; the General Counsel filed a brief in answer to Respondent's exceptions and brief, cross-exceptions and a supporting brief; Respondent filed a brief in answer to the General Counsel's cross-exceptions

and briefs; and the Charging Party filed its brief previously submitted to the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, The National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, Lehigh Lumber Company, Allentown, Pennsylvania, and Brown-Borhek Company, Bethlehem, Pennsylvania, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. July 25, 1977

Howard Jenkins, Jr., Member

(SEAL)

John A. Penello, Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-2076 May 23, 1978

LEHIGH LUMBER COMPANY, INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor

Present: Adams, Van Dusen and Rosenn,
Circuit Judges.

1. Motion by petitioner to stay the enforcement of the Board's order and order a trial DE NOVO,

in the above-entitled case. The judgment order was entered on May 16, 1978.

The foregoing Motion is/are denied.

By the Court,

Dated: June 2, 1978 ADAMS

Judge

ARTICLE 4. **UNION** MEMBERSHIP

2. Any person hired by an Employer for work in any of the job classifications included in this Agreement, prior to or subsequent to the effective date of this Agreement, shall be hired as a temporary employee, and in the event that

such person is continued in employment seven (7) days after the date of his employment, he shall be required as a condition of continued employment, to become and remain a member in good standing in the Union.

Supreme Court, U. S.
FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

No. 78-245

In the Supreme Court of the United States

OCTOBER TERM, 1978

LEHIGH LUMBER COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN S. IRVING
General Counsel
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-245

LEHIGH LUMBER COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. Petitioner is a wholesale and retail seller of lumber and building supplies whose truck drivers, mobile lumber handling equipment operators, helpers and yardmen are represented by Local 773, International Brotherhood of Teamsters ("the Union"). Since 1972, petitioner has belonged to the Lehigh Valley Lumberman's Association ("the Association"), a multi-employer organization that represents its members in negotiations with the Union (App. 5a-6a).[1] The most

[1] "App." references are to the Board's decision and order and the decision of the Administrative Law Judge adopted by the Board. These were not included in the appendix to the petition and are reproduced in the appendix hereto.

recent collective bargaining agreement between the Association and the Union was due to expire on May 1, 1976 (App. 6a-7a). The Board found that during and subsequent to the commencement of negotiations for a new contract, petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158 (a)(1), by threatening employees with reprisals for rejecting its bargaining proposals, by threatening striking employees with discharge, by promising employees increased benefits in return for abandoning the strike, by threatening to refuse to execute a contract unless the employees abandoned the strike, by promoting decertification petitions and by otherwise soliciting employees to withdraw from the Union (App. 31a). Additionally, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by bargaining directly with employees, by promising wages to an individual employee not offered to the Union during negotiations, and by withdrawing recognition from the Union (App. 2a, 31a).

The court of appeals upheld the Board's decision without opinion (Pet. App. 1).

2. At the unfair labor practice hearing, petitioner argued that a bargaining impasse was reached by the end of July 1976 and "thereafter the employees [became] disenchanted with the Union," causing the Union to lose its majority status and relieving petitioner from its duty to bargain with the Union (App. 27a-28a). The Administrative Law Judge rejected that defense, finding that petitioner's vigorous campaign to undermine the Union began in April, several months before

the impasse, and that in such circumstances petitioner could not rely on alleged employee "disenchantment" with the Union to justify its doubt about the Union's continuing majority status (App. 28a).

In its post-hearing brief, petitioner raised the argument, for the first time, that the Association's collective bargaining agreement, which the General Counsel had introduced at the hearing to support a presumption of the Union's majority status,[2] could not be relied upon for that purpose because the agreement contained an invalid union security clause that improperly required union membership after seven days of employment rather than 30 days of employment.[3]

The Administrative Law Judge refused to consider this defense, stating (App. 29a):

> It was not raised in the answer, nor was the matter litigated, although [petitioner] had the opportunity to do so. * * * * While [petitioner's] Counsel makes the naked assertion that all previous contracts contained the same provision none of those agreements are in evidence nor were they offered. In any event, the record does not demonstrate that employees were coerced into becoming union members. On the contrary, each of the unit employees strongly supported the Union and at

[2] The existence of a collective agreement raises a presumption that the signatory union enjoys majority support. See *e.g.*, *National Labor Relations Board* v. *Vegas Vic, Inc.*, 546 F. 2d 828, 829 (9th Cir.), cert. denied, 434 U.S. 818 (1977).

[3] Read together, Sections 8(a)(3), 8(b)(2), and 8(f) of the Act, 29 U.S.C. 158(a)(3), 158(b)(2), and 158(f), permit 7-day union security clauses in the construction industry and permit 30-day union security clauses in all other industries.

various times engaged in picketing in support thereof. Under all the circumstances noting particularly that the matter had not been litigated, I find it inappropriate to consider this defense at this stage of the proceeding. [Citation and footnote omitted.[4]]

3. The sole question presented in the petition is whether the collective agreement was improperly relied upon to establish a rebuttable presumption that the Union enjoyed majority support. That question, however, is not properly presented here; the Administrative Law Judge refused to consider the contention because it was not timely raised during the hearing. Accordingly, the only issue presented on this record is the propriety, in the circumstances of this case, of the Administrative Law Judge's refusal to consider petitioner's belated contention after the closing of the record. That narrow procedural issue does not warrant review by this Court.

In any event, the Administrative Law Judge's ruling was correct. At the hearing petitioner not only failed to advance the contention, but actually advanced a totally different and indeed inconsistent contention—that the Union enjoyed majority status until the employees became "disenchanted" during the protracted negotiations following expiration of the agreement (App. 27a). Had petitioner challenged the General Counsel's reliance on the presumption arising from the

[4] The Administrative Law Judge also pointed out that petitioner's interjection of this defense after the closing of the record resulted in a lack of information needed to conclusively determine the issues raised (App. 29a).

contract during the hearing, the General Counsel would have had the opportunity to introduce other evidence to establish majority status. Because petitioner's failure to timely raise its contention precluded the introduction of relevant evidence to rebut it, considerations of fairness and orderly administrative procedure dictated that petitioner not reap a tactical advantage from its dilatory conduct.

Finally, as the Administrative Law Judge pointed out, there was substantial evidence of record, apart from the challenged contract, which constituted a *prima facie* showing of majority status. On July 5, 1976, the strike against petitioner commenced, with all of the employees represented by the Union answering the Union's strike call and participating in the picketing; at the time of the hearing, those employees were still on strike (App. 20a). On this basis, the Administrative Law Judge found that "each of the unit employees strongly supported the Union and at various times engaged in picketing in support thereof" (App. 29a). As the Eighth Circuit recently stated in *Royal Typewriter Co.* v. *National Labor Relations Board*, 533 F.2d 1030, 1037 (1976):

> [I]t [is] a little short of absurd for an employer to express doubt as to the representative status of a union when the majority of the employees [are] on strike under its guidance. [5]

[5] The cases relied on by petitioner (*Standard Molding Corporation*, 137 N.L.R.B. 1515 (1962); *Santa Fe Trail Transportation Co.*, 139 N.L.R.B. 1513 (1962); *National Labor Relations Board* v. *Martin Building Material Co.*, 431 F. 2d 1246 (5th Cir. 1970)) simply hold that an illegal provision in a collective bargaining agree-

See also *National Labor Relations Board* v. *Preston Feed Corporation,* 309 F.2d 346, 351 (4th Cir. 1962).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JOHN S. IRVING
General Counsel
National Labor Relations Board

OCTOBER 1978

ment may justify a departure from the rule barring representation elections during the term of the agreement. Those cases do not disagree with the principle that a contract manifesting an employer's voluntary recognition of the union will support an inference of majority status in an unfair labor practice proceeding, and certainly do not suggest that defects in such agreements will override other competent evidence demonstrating majority status.

APPENDIX

JPW
D—2699
Bethlehem, Pa.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEHIGH LUMBER COMPANY
and
BROWN-BORHEK COMPANY
and
LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Case 4—CA—8147

DECISION AND ORDER

On April 26, 1977, Administrative Law Judge Irwin Kaplan issued the attached Decision in this proceeding. Thereafter, the Respondent Lehigh Lumber Company filed exceptions and a supporting brief; the General Counsel filed a brief in answer to Respondent's exceptions and brief, cross-exceptions and a supporting brief; Respondent filed a brief in answer to the General Counsel's cross-exceptions and briefs; and the Charging Party filed its brief previously submitted to the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended

[1] The Administrative Law Judge found a violation of Sec. 8(a)(1) for Respondent Lehigh Lumber's promising an employee increased wages and benefits to induce him to abandon the Union. The General Counsel has excepted to the Administrative Law Judge's failure to find a violation of Sec. 8(a)(5) for that conduct. Since dealing directly with employees about terms and conditions of employment, as well as offering employees benefits not offered the Union, have been found to be conduct violative of Sec. 8(a)(5) as well as 8(a)(1), we find a violation of 8(a)(5) for the promises of higher wages and benefits made directly to an employee. See *J. H. Bonck Company, Inc.*, 170 NLRB 1471, 1482 (1968).

The Respondent asserts that the Administrative Law Judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

Order of the Administrative Law Judge and hereby orders that the Respondents, Lehigh Lumber Company, Allentown, Pennsylvania, and Brown-Borhek Company, Bethlehem, Pennsylvania, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. July 25, 1977

HOWARD JENKINS, JR., Member

JOHN A. PENELLO, Member

PETER D. WALTHER, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

JD-256-77
Allentown, PA
Bethlehem, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LEHIGH LUMBER COMPANY

and

BROWN-BORHEK COMPANY

and

Case 4-CA-8147

LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Mariann E. Schick, Esq., of Philadelphia, PA, for the General Counsel.

Louis M. Busch, Esq., of Macungie, PA, for the Respondent.

Stephen C. Richman, Esq., and *Aaron Matte, Esq.* (*Markowitz & Kirschner*), of Philadelphia, PA, for the Charging Party.

DECISION

Statement of the Case

IRWIN KAPLAN, Administrative Law Judge: This case was tried at Allentown, Pennsylvania, on January 19-20, 1977. The charge was filed by Local 773, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, on August 9, 1976 (amended August

25, 1976), and the complaint thereon issued on November 19, 1976 (amended at the trial). The complaint and the amendments thereto alleged that Lehigh Lumber Company, hereinafter Lehigh, and Brown-Borhek Company, hereinafter Brown-Borhek and jointly referred to herein as Respondents, engaged in various acts of unlawful interference such as threats, promises of benefits, bargaining directly with employees in derogation of the Union's exclusive bargaining status, and assisting and abetting employees in the filing of decertification petitions in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for General Counsel,[1] Respondents, and the Union, I make the following:

Findings of Fact

I. Jurisdiction

Respondents are, and have been at all times material herein, Pennsylvania corporations engaged in the wholesale and retail sale of lumber and building supplies. Respondent Lehigh's facility is located at 1030 North Sherman Street, Allentown, Pennsylvania, and Respondent Brown-Borhek's facility is located at 3283 Easton Avenue, Bethlehem, Pennsylvania. During the past year, each had gross revenues in excess of $500,000. During the same period, Respondents each purchased

[1] Counsel for the General Counsel filed a Motion for Special Leave to File Reply Brief, with accompanying Reply Brief which was received by the Division of Judges on March 17, 1977. For reasons stated below, the request is hereby denied. See fn. 35.

in excess of $50,000 worth of goods directly from firms located outside the Commonwealth of Pennsylvania and sold in excess of $50,000 worth of goods directly to firms located outside the Commonwealth of Pennsylvania. Respondents admit, and I find, that each is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

Respondents have admittedly, entered into collective-bargaining agreements with the Union, the most recent of which expired May 1, 1976, covering *inter alia* Respondent Lehigh's employees employed at 1030 North Sherman Street, Allentown, Pennsylvania and Respondent Brown-Borhek's employees employed at 3283 Easton Avenue, Bethlehem, Pennsylvania. The record further reveals that at all material times herein certain employees of Respondents have been members of the Union. Based on the foregoing and the record as a whole, I find that the Union, is and was at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

(a) *The Background—Collective Bargaining History*

For many years, employees of Respondents employed as truck drivers, mobile lumber handling equipment operators, helpers and yardmen have been represented by the Union. Since June, 1972, Respondents have been members of the Lehigh Valley Lumbermen's Association. Sometime prior thereto Respondents had been

members of the Lehigh Valley Contractors Association and from time to time members of other associations for collective-bargaining purposes. The Lehigh Valley Lumbermen's Association which negotiated the most recent agreement which by its terms was effective May 1, 1973, until May 1, 1976, commenced negotiations for a new contract in April, 1976. The parties had approximately, eight or nine negotiating sessions, the last occurring on July 31, 1976, without reaching an agreement on a contract. Thereafter the Union requested in writing to meet and bargain but Respondents have refused on the basis that the Union has lost its majority status.

The principals for Respondents are Bruce Ferretti president of Lehigh and Carl Del Nero president of Brown-Borhek.

(b) *The Appropriate Unit*

It is undisputed that at all times material herein, Respondents have been members of the Lehigh Valley Lumbermen's Association, a multi-employer association composed of employers in the lumber business which exists, *inter alia,* for the purpose of representing its employer members in the negotiation of collective-bargaining agreements with the Union. The following employees of employer members of the Lehigh Valley Lumbermen's Association including employees of Respondents herein constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All truck drivers, mobile lumber handling equipment

operators, helpers and yardmen, excluding supervisors as defined in the Act.[2]

(c) *The Alleged Conduct at Lehigh*

On or about April 29, 1976,[3] Bruce Ferretti president, and sole owner of Lehigh met with Eddie Kremposky, Sr., Eddie Kremposky, Jr., Joseph Kremposky, Robert Piatt and John Sekoch.[4] Ferretti gave each of the employees in attendance a sheet of paper which outlined the proposal which he had just recently made to the Union. After Ferretti read the proposal to the employees he asked for a discussion. Ferretti testified that he was surprised that the employees did not ask any questions. According to the testimony of the employees when Ferretti distributed copies of the proposal to each of the employees he, Ferretti stated that this is my final offer and if you do not accept it, there will be no work the following Monday. Ferretti then told Sekoch, Piatt and Joseph Kremposky to return the keys to the company yard. From on or about May 1 for a period of approximately 6 weeks the employees in the Teamster unit did not work.[5] The employees returned

[2] The classifications with regard to unit inclusions appears as described in the complaint and in the most recently expired collective-bargaining agreement. At the trial Counsel for Respondent noted that office clerical employees traditionally have been excluded although there is no reference to office clerical employees in the aforementioned agreement. As there is no substantive dispute between the parties regarding the composition of the relevant unit, I make the finding as expressed hereinabove.

[3] All dates hereinafter refer to 1976 unless otherwise noted.

[4] The Teamster unit at Lehigh comprised these five individuals.

[5] While it is not clear whether the employees during this period were on strike, or locked out, it is noted that no unfair labor practice strike is alleged.

to work only after Respondent Lehigh sent letters requesting that they return.

The General Counsel alleges that Respondent Lehigh not only unlawfully bargained directly with employees during the above described meeting of April 29 but that on various occasions during the months of April, June, July, and August engaged in independent acts of unlawful interference, threats, and promise of benefits designed to undermine and dissipate the Union's majority status. In support thereof Edward Kremposky, Sr. and his son, Edward Kremposky, Jr. testified that on or about April 24, Ferretti told the senior Kremposky in the presence of his son that the Teamsters were giving him a "screwing" and that he should look for another union. The senior Kremposky also testified that Ferretti told him on or about June 22 that it only takes three out of five employees to vote the Union out. Further, Edward Kremposky, Sr., his son, and other employees testified that on July 2, Ferretti held a meeting attended by all five Teamster unit employees in the garage. According to the testimony of General Counsel's witnesses, Ferretti announced at the meeting that negotiations with the Union had gotten nowhere and that he, Ferretti was of the view the Union Business Agent Caskie was going to call a strike. The employees testified that Ferretti warned them that they would never work for Lehigh again if they engaged in the strike. Edward Kremposky, Sr., testified that minutes after the garage meeting Ferretti repeated the aforesaid threat to him while he was working alone on the forklift truck. Ferretti admits that he called the employees together for a meeting in the garage on July

2, but only to review the latest offer to the Union. Ferretti denies making the other statements attributed to him. A strike commenced on or about July 6 with all 5 Teamster unit employees participating in the picketing.

Still further, John Sekoch testified that on about August 3 Ferretti promised him while he Sekoch was on the picket line that if he returned to work he would be paid the same wages as the mill employees [6] but that there would be no contract with the Union. Joseph Kremposky testified that on August 4 while on the picket line, Ferretti told him that if he didn't return to work the following day and abandon his support for the Union he would never work for Lehigh again.

(d) *The Alleged Conduct at Brown-Borhek*

The strike against Brown-Borhek commenced on July 26. On July 27 Carl Del Nero, President of Brown-Borhek told his striking employees that the employees of Ritter and Smith [7] had withdrawn from the Union and were not on strike. He suggested to Robert Stahr, a striking employee that he listen in on his phone conversation with the owner of Ritter and Smith to verify what he just told them. The owner of Ritter and Smith with Stahr on the extension told Del Nero that his employees had not gone on strike and had withdrawn from the Union. Stahr then went outside the facility

[6] The mill employees are represented by the Carpenters and Joiners Union (herein Carpenters).

[7] Ritter and Smith Company was a signatory member employer to the most recent contract which expired on May 1, 1976. There are no allegations herein with regard to Ritter and Smith Company.

and in the presence of Del Nero told the other striking employees what he heard on the extension. The employees decided to return to work the same day. According to the testimony of General Counsel's witnesses sometime between July 27 and July 29 Stahr and employee, Ralph Minnich went to see Del Nero in his office to urge him to resolve the problems with the Union contract. Del Nero described the benefits he was willing to give and those items he would not provide. However he pointed out that Lehigh and Ritter and Smith no longer had to deal with the Union and Brown-Borhek would not be the only company stuck. He added that he didn't want to be bothered with the Union anymore. Del Nero had Stahr listen in on the extension while he telephoned his attorney. At one point during the phone conversation Del Nero asked his attorney what would happen if the employees dropped out of the Union to which the attorney responded that aside from phone calls in the middle of the night anl harassment, the Union could do nothing. Stahr testified that he also heard the attorney state that the employees of Ritter and Smith had sent papers to the Labor Board and had written the Teamster President that they no longer desired to be affiliated with the Teamsters. During this same session Del Nero told Stahr and Minnich that if they wanted to get out of the Union only they could send the [decertification] papers in. Stahr and Minnich remarked that they wouldn't do anything until Kenneth Deck, an employee returned from his vacation.

On or about August 2, Del Nero called Kenneth Deck,

Ralph Minnich and Robert Stahr and Fred Weider[8] for a meeting in the lunch room and made a proposal. He said *inter alia* that he could give 20 cents increase the first year, 15 cents the second, and 15 cents the third year, an insurance policy and pension if the employees dropped out of the Union. He warned that if they refused they would not work. Sometime later and during the month of August Del Nero called Deck and Minnich to his office to explain the procedure for getting the appropriate papers to the Labor Board and dropping the Union.

Del Nero denies that he made any of the above-described threats or that he conditioned benefits on the employees abandoning the Union.[9]

(e) *Credibility Resolutions*

A substantial portion of the allegations herein depend largely on credibility. Thus a separate section herein is devoted to its resolution. On the basis of demeanor, a careful reading of the record, and consideration of what is reasonably plausible, I have credited General Counsel's witnesses over Respondents' witnesses in those areas where the testimony is in conflict.

With regard to Respondent Lehigh, I found Bruce Ferretti to be evasive, unresponsive and unconvincing. For example, the last question asked of Ferretti on direct examination was whether he had ever refused to bargain with the Union. He responded categorically

[8] It appears that these individuals were the only Brown-Borhek unit employees employed at that time.

[9] Del Nero's position will be discussed more fully *infra*.

"I've never refused to bargain with the Union." When counsel for the General Counsel immediately thereafter on cross-examination attempted to explore Ferretti's answer that he had not refused to bargain with the Union, Ferretti asked that question be repeated or rephrased. The question was repeated, but again Ferretti failed to respond. The Administrative Law Judge herein found it necessary to caution the witness that his testimony will be accorded less weight if he continued to be unresponsive. While Ferretti responded to questions put to him by the Law Judge, he continued to be evasive and unresponsive on cross-examination.

According to Ferretti he had no knowledge that the Union made any request to meet and bargain after the last bargaining session of July 31. The evidence however reveals that the Union subsequent to July 31, on a number of occasions sent letters to Louis Busch, counsel for Respondents requesting further bargaining sessions.[10] In this connection it is noted that Attorney Busch acknowledged receipt of the aforesaid letters. The evidence further reveals that Ferretti was not merely casually interested in the progress of the negotiations but was intimately involved therein. He attended and participated in all but one of the approximately nine bargaining sessions. In these circumstances Ferretti's assertion that he was unaware of the Union's further requests to meet and bargain is unpersuasive.

In view of the foregoing, and other reasons delineated below in the section entitled ***Discussion and Findings,***

[10] See Charging Party's Exhibits Nos. 1 and 2.

and the record as a whole, I find Ferretti's testimony to be unreliable.

With regard to Respondent Brown-Borhek, I find that the testimony of Carl Del Nero was also unconvincing and unreliable. The uncontroverted testimony of Robert Stahr reveals that sometime between July 27 and July 29 Del Nero had him listen in on a phone conversation with Attorney Busch. During this conversation Attorney Busch related *inter alia* that employees of Ritter and Smith had sent papers to the Labor Board and had written to the Union President that they no longer wanted to be represented by the Union.[11] Stahr also credibly testified that on July 27 Carl Del Nero interviewed him and other employees while they were engaged in picketing on the second day of the strike and informed them that employees at Ritter and Smith had not gone on strike and had withdrawn from the Union. It is undisputed that Del Nero invited Stahr to listen in on the extension while he telephoned the owner of Ritter and Smith to verify. According to Del Nero, it was the employees who

[11] Attorney Busch, objected to the testimony on the basis that *Stahr* was a statutory supervisor at the time of the telephone conversation and therefore any conversation that he had with Del Nero was privileged and inadmissible. It is noted that no authority was cited in support of the objection and that Respondent's brief makes no reference thereto or to Stahr's alleged supervisory status. In any event the record reveals that *Stahr* did not hire, give time off, promote, discipline or discharge employees nor did he have the authority. He punched a time clock, and received the same fringe benefits as other unit employees. Further, his terms and conditions of employment were governed by the Union contract. In view of the foregoing, and in the absence of any evidence to the contrary, I find that *Stahr* at all times material herein was a non-supervisory unit employee.

approached him regarding the situation at Ritter and Smith and he asked Stahr to listen in on the extension for both the strikers and his own "peace of mind."

In these circumstances I am unimpressed with Del Nero's attempt to shift the onus to the striking employees. Even by his own account the employees asked him whether Ritter and Smith's employees were working. He volunteered the information that employees wrote to the Union president advising that they no longer wanted the Union to represent them and the filing of the decertification petition. In view of the foregoing, demeanor, and consideration of what is reasonably plausible I find that the testimony of Del Nero is unreliable.

On the other hand I find that the testimony of General Counsel's witnesses was generally consistent and worthy of belief.

(f) *Discussion and Findings*

(1) *Section 8(a)(1) allegations—Lehigh*

As previously noted, the most recent collective bargaining expired on May 1, 1976. The credited testimony reveals that approximately one week prior thereto,[12] Ferretti approached the senior Ed Kremposky in the presence of his son and remarked that the Teamsters were no good, were giving him a "screwing" and that he ought to look for another union. I find that Ferretti's remarks were intended to denigrate the Union in the

[12] While the complaint as amended at the hearing alleges that this occurrence took place on April 29, the testimony clearly reveals that the event took place approximately one week earlier.

eyes of the employees and violative of Section 8(a)(1) of the Act.[13]

Approximately one week later, on April 29, Ferretti called a meeting of all five Teamster unit employees. Four of the five employees testified to the event and the content was substantially the same. According to the employees, Ferretti gave each of them a piece of paper containing the highlights of the Company's last proposal to the Union and remarked that this was his final offer and added that the employees could not work the following Monday if the proposal was not accepted by them. He then read the proposal and asked for a discussion, but the employees had nothing to say. He also asked Sekoch, Piatt and Joseph Kremposky for their keys to the company yard. Piatt had his key for over one month and this was the first time Ferretti asked him for it. Ferretti concedes to conducting the meeting but insists that he merely wanted the employees to know of his latest proposal to the Union. He denies he expressed an ultimatum and denies asking for the keys to be returned at that meeting. Counsel for Respondent Lehigh in his brief asserts that Ferretti merely informed the employees of proposals made to the Union without any attempt to deal directly or negotiate separately with its employees and that such information is within the free speech privilege of Section 8(c) of the Act.[14] Ferretti's own account of what transpired at the

[13] *Daisy's Originals, Inc., of Miami*, 187 NLRB 251, 255-256.

[14] Section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual term, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

last bargaining session, which Ferretti states may have been held on April 28, probably provided the impetus and setting for the April 29 meeting. At that session, Ferretti requested that union business agent Caskie take the company offer to the employees to which Caskie replied that he would when he's good and ready. Caskie remarked to Ferretti that the men had taken a strike vote. According to Ferretti, as far as he was concerned, the Union was on strike from that point on. In view of Ferretti's admitted estimation of the situation, the testimony of the employees to the effect that Ferretti gave them an ultimatum to accept the proposal or there will be no work takes on greater credence. Ferretti's demand that employees return their keys adds further support that he gave the employees an ultimatum. Ferretti admits that he asked for a discussion of the proposal, and was surprised that none of the employees had anything to say. In the face of an ultimatum, the employees had little option. In these circumstances, I find the testimony of the General Counsel's witnesses more plausible than Ferretti's uncorroborated version.

Accordingly, on the basis of the credited testimony, I find Respondent Lehigh, by its president, threatened its employees with reprisals if they rejected the proposal. Such acts and conduct violated not only Section 8(a)(1) of the Act, but represent an attempt to bargain separately with the employees in violation of Section 8(a)(1) and (5) as well.[15]

[15] *Typoservice Corporation*, 203 NLRB 1180.

The employees did not work from May 1 to on or about June 10 at which time they returned pursuant to the Company's request. The credited testimony reveals that on or about June 22, Ferretti approached Edward Kremposky, Sr., while the latter was working on the forklift truck and stated that he was standing pat on the proposal and was not going to budge. He suggested to Kremposky that if he did not like working for the Company that he could leave. A few minutes later, Ferretti approached Kremposky again and advised "You know it only takes three out of five to vote the Union out of here."

Ferretti denies that the conversation regarding an election occurred in the context as testified by Kremposky. According to Ferretti, he had two conversations with employees while they were engaged in picketing. He had one such conversation with John Sekoch, by himself, and a second conversation with Sekoch in the presence of Edward Kremposky, Sr., Joe Kremposky, and Bob Piatt. Ferretti testified that Sekoch did the talking on both occasions, because he was the union steward. Ferretti further testified that Sekoch approached him on both occasions and inquired of Ferretti whether it would help if they got rid of Caskie to which Ferretti responded that he would check with his attorney. Thereafter, he passed on to his employees that his attorney advised him that a majority of the employees could vote the Union out.

I find Ferretti's attempt to place the event in context both awkward and unconvincing. In this regard, Ed Kremposky, Sr., testified credibly that the disputed

conversation took place after the employees returned to work and not while they were engaged in picketing. Further, I find it highly improbable that Sekoch, union steward, would have to ask twice whether it would help if the employees got rid of Caskie. Still further, even by Ferretti's account, Sekoch asked only whether it would help if the employees got rid of Caskie, not the Union. I find that Ferretti's act of volunteering to Edward Kremposky, Sr., that it takes only three out of five to vote the Union out was an attempt to promote a decertification proceeding and violative of Section 8(a)(1) of the Act.[16]

It is undisputed that on July 2, Ferretti conducted a meeting in the garage attended by all five Teamster unit employees. The General Counsel's witnesses testified credibly that Ferretti announced that there had been no progress during negotiations and that he, Ferretti, believed that Caskie was going to call a strike. Ferretti warned the employees that if they went on strike, they would never work for the Company again. Approximately 5 minutes after the meeting, Ferretti repeated his threat to Ed Kremposky, Sr., that if the employees strike, they would never work for the Company again. Later that same morning, Ferretti alluded once again to the strike and told Kremposky that if the men strike, he would get rid of them and the ——— Union once and for all. Ferretti denies making any of the statements attributed to him by Kremposky and the other employees. He asserts that he got the Teamster unit

[16] See *Royal Himmel Distilling Co.*, 203 NLRB 370.

employees for a meeting merely to review the Company's offer at that time.

As I have credited General Counsel's witnesses regarding the events of July 2,[17] I find that Respondent Lehigh threatened its employees with reprisals if they engaged in the strike in violation of Section 8(a)(1) of the Act.[18]

A strike commenced on or about July 5, participated in by all five unit employees. At the time of the instant trial, all five individuals were still engaged in the strike.

John Sekoch credibly testified that on or about August 3, while he was engaged in picketing at the gate to the facility, he was approached by Ferretti who asked whether he would consider returning to work. Ferretti commented that he, Sekoch, should be more concerned about himself and noted that things must be rough at home. He offered Sekoch the same wages that mill employees were earning.[19] Sekoch questioned Ferretti

[17] It is also alleged in the complaint that Ferretti told its employees on June 25, that if they went out on strike they would be replaced and would no longer work for Lehigh Lumber. Only Robert Piatt testified in support of the aforesaid allegation and it is clear that he was confused about the date and must have been referring to the events of the July 2 meeting. Thus Piatt first testified that the event occurred in early July, then later testified that it happened somewhere around June 24. Further Piatt places the meeting two and one half weeks after the employees returned to work in mid-June. This would further tend to support the July 2 date. Moreover, while Piatt testified that all the Teamster unit employees attended the meeting, and all of them testified, there was no corroboration regarding any such meeting on or about June 25. In these circumstances, I find that no such meeting was held on June 25, and I shall recommend dismissal of this allegation of the complaint.

[18] *Typoservice Corporation, supra.*

[19] The record reveals that mill employees covered by the Carpenter contract earn higher wages than Teamster unit employees.

about his pension, to which Ferretti replied that the government would take care of it. Sekoch also asked Ferretti about the other employees. Ferretti told Sekoch that he would take Joseph Kremposky back, but not Ed Kremposky, Sr., his son, and Bob Pratt because they are troublemakers and agitators. During this conversation, Ferretti stated that the National Labor Relations Board would conduct an election, and a combination of employees from the other two companies and new employees would outvote the Teamster supporters. Sekoch asked about the Teamster contract, and was told by Ferretti that there would not be a contract.

Ferretti concedes that he spoke with Sekoch while the latter was on the picket line on August 3, but denies that he asked him to return to work or that he made any promises of benefits to him. According to Ferretti, he had replaced Sekoch with a new employee and he was concerned about Sekoch's welfare and family and that was the extent of the conversation. I find that Ferretti's expressions of compassion and concern in these circumstances unconvincing. In weighing the aforementioned contrasting versions, the account given by Sekoch is further strengthened by the testimony of Joseph Kremposky. In this regard, Joseph Kremposky credibly testified that on August 4, Ferretti asked him whether Sekoch had talked to him about returning to work. Ferretti made it clear to Kremposky that he could return to work only if he abandoned the Union. He also told Kremposky to tell Caskie "that there will be no Union in here." Kremposky did not respond and started to walk away from Ferretti when the latter

pointed out that Kremposky should think about his family. Finally, Ferretti warned Kremposky that if he did not return to work the following morning that he would never work for Lehigh again.

Thus, on the basis of credited testimony, I find that Respondent Lehigh by its President Ferretti on or about August 3 and August 4, promised employees increased wages and other benefits to induce them to abandon the Union, threatened employees that if they continued to strike that they will not be reemployed, and threatened employees that the Company would not have a contract with the Union. Such acts and conduct violated Section 8(a)(1) of the Act.[20]

It is further alleged in the complaint that on or about July 12, 1976, David Miller as agent for Respondent Lehigh told an employee on two occasions that certain employees could not return to work because they engaged in union and other protected activities. Miller[21] testified credibly that he approached Ferretti in early July because he wanted to be of some help in ending the strike. He told Ferretti that he believed that if he spoke to Sekoch and got him to come in he "would bring the whole thing to a head, the whole strike situation." According to Miller all Ferretti said was that he thought it would be a good idea. Edward Kremposky, Sr. testified that on or about July 16, Miller told him that Ferretti would take back Sekoch and Joe

[20] *Typoservice Corporation, supra.*

[21] At all times material herein David Miller was a non-supervisory mill employee and member of the Carpenters Union. He functioned as a shop steward although not officially designated and was a member of the Carpenters negotiating committee.

Kremposky but no one else. Kremposky further testified that Miller told him that Ferretti would take Sekoch and Joe Kremposky back with or without the Union. No evidence was adduced tending to show that Ferretti authorized Miller to talk to Edward Kremposky and there was no testimony as to what if anything Miller said to Sekoch. With regard to whether Miller's statement to Kremposky is coercive it is noted that Miller expressly pointed out that Ferretti would take back Sekoch and Joe Kremposky with or without the Union. I find that Miller did not possess any such strategic position with the company so that Respondent Lehigh was responsible for his acts on an agency basis or on any other basis.[22] Accordingly, I shall recommend that this allegation be dismissed.

(2) *Section 8(a)(1) allegations—Brown-Borhek*

The employees of Brown-Borhek went on strike on or about July 26. Employee Robert Stahr testified credibly that on July 27, Del Nero informed the employees on the picket line that the employees of Ritter and Smith had withdrawn from the Union, and were not on strike and urged Stahr to listen in on the extension while he telephoned the owner of Ritter and Smith to verify. Del Nero then placed the telephone call with Stahr on the extension. Stahr heard the owner of Ritter and Smith tell Del Nero that his men had not gone on

[22] E.g., *Crown Corrugated Container, Inc.*, 123 NLRB 318, 324; *Page Boy Company, Inc.*, 107 NLRB 126, 130.

strike. Stahr then went outside the building and told the other striking employees what he heard on the extension. The employees discussed the matter in Del Nero's presence and decided to go back to work.

Del Nero concedes that he had the conversation with his striking employees regarding the Union situation at Ritter and Smith and further admits that Stahr listened in on the phone extension pursuant to his request. However, he asserts it was the striking employees who initiated the discussion. According to Del Nero, the picketing employees called him over to verify that Ritter and Smith's employees were working. Del Nero testified that since the employees asked him about the situation at Ritter and Smith, he could tell them that it was his understanding that the employees wrote a letter to the Union stating that they no longer wanted to be represented and that they filed a decertification petition with the National Labor Relations Board. Thus, by Del Nero's own account, he did not merely inform his employees that the employees of Ritter and Smith went back to work but informed his employees that Ritter and Smith's employees wrote to the Union stating that they no longer wanted it to represent them and further that the employees also filed a decertification petition.

In view of subsequent events and because Del Nero's version is less convincing than Stahr's and as I have otherwise discredited Del Nero, I find that Del Nero initiated the discussion concerning the Union situation at Ritter and Smith as part of a campaign designed to promote a decertification petition and rid himself of the Union in violation of Section 8(a)(1) of the Act.[23]

[23] See *Royal Himmel Distilling Co., supra.*

The credible evidence reveals that some time between July 27 and July 29, Stahr and employee Ralph Minnich went to see Del Nero in his office to urge him to resolve the problems with the contract. Del Nero listed the benefits he could provide but he pointed out that Lehigh and Ritter and Smith no longer had to bargain with the Union and that he would not be the only one stuck with the Union. He requested either one of them to listen in on the extension while he telephoned his attorney. Stahr listened in on the extension and heard the Company's attorney describe the situation at Ritter and Smith. At one point during the telephone conversation, Del Nero asked his attorney what would happen if the employees dropped out of the Union to which the attorney responded that aside from phone calls in the middle of the night and harassment, the Union could do nothing.[24] Stahr's testimony with regard to the foregoing telephone conversation was virtually uncontroverted. During the session, Del Nero told Stahr and Minnich that if they wanted to get out of the Union, only they could send the [decertification] papers in. They stated they would not do anything until employee Kenny Deck returned from vacation. I find that Del Nero's threat that his company would not be the only one "stuck with the Union" and his further efforts to promote a decertification petition, to be acts and conduct violative of Section 8(a)(1) of the Act.[25]

[24] In the absence of any allegation, and in view of my other findings I deem it unnecessary to discuss the propriety of the attorney's participation. Stahr credibly testified that Del Nero told the attorney that Stahr was on the extension.

[25] *Typoservice Corporation, supra; Royal Himmel Distilling Co., supra.*

The credited testimony reveals that when Kenneth Deck returned from his vacation on or about August 2, Del Nero called all four unit employees into the lunch room and made a proposal. He offered *inter alia,* wage increases, insurance policy, and a pension, but only if the employees withdrew from the Union. He cautioned them that if they refused the proposal they would not work for Brown-Borhek. Within a few days Del Nero called employees Deck and Minnich to his office to explain the procedure for getting the appropriate papers to the Labor Board. Later the same month employees Deck and Minnich filed a decertification petition in Case No. 4-RD-718.[26] For reasons stated heretofore, I do not credit Del Nero's denial regarding the events in August described hereinabove.

I find that on or about August 2, and on or about August 3, Respondent Brown-Borhek promised its employees that they would enjoy greater benefits if they abandoned the Union, and threatened employees with termination if they continued their allegiance to the Union. I further find that the decertification petition filed by employees Deck and Minnich resulted largely, if not entirely from Respondent Brown-Borhek's conduct. Such acts and conduct violate Section 8(a)(1) of the Act.[27]

(g) *The Union's Majority Representation*

It is undisputed that Respondents and the Union have been parties to a long series of successive collec-

[26] See G.C. Exh. 3.

[27] *Daisy's Originals, Inc., of Miami, supra; Typoservice Corporation, supra.*

tive-bargaining agreements.[28] The last agreement by its terms was effective May 1, 1973, to May 1, 1976, and was placed in evidence by General Counsel.[29] It has been held that the General Counsel can meet his initial burden of proving a union's majority status by showing a past agreement, which gives rise to a presumption of continuing majority upon expiration.[30] This is true whether the union obtained its initial bargaining position pursuant to certification or recognition.[31]

Applying the foregoing principles to the instant case it is clear that General Counsel has established a prima facie case regarding the Union's majority status. However, an employer may challenge or rebut an incumbent union's bargaining status whenever a collective-bargaining agreement expires, if it can demonstrate by objective considerations that it has lost its majority.[32]

In the instant case Respondents argue that an impasse was reached on July 31 and thereafter the employees had become disenchanted with the Union. According to Respondents this disenchantment was manifest by decertification petitions and attempts by employees to bypass their representative and deal directly with Respondents. Thus, Respondents assert it

[28] The record does not disclose how the Union initially obtained its bargaining status.

[29] G.C. Exh. 2.

[30] *Weber's Bakery* 211 NLRB 1, 10; *Automated Business Systems,* 205 NLRB 532; *Terrell Machine Company,* 173 NLRB 1480, 1480-81, enfd. 427 F. 2d 1088.

[31] *Bartenders Association of Pocatello,* 213 NLRB 651; *Emerson Manufacturing Company, Inc.,* 200 NLRB 148, 150.

[32] *Creative Engineering, Inc.,* 228 NLRB No. 67; *United States Gypsum Co.,* 157 NLRB 652.

was absolved from any obligation to continue to meet and bargain with the Union. Respondents embarked on its anti-union campaign and engaged in serious unfair labor practices long before July 31 when the alleged impasse was reached. With regard to Respondent Lehigh, Ferretti began his campaign to undermine the Union in April, even before the most recent contract expired. With regard to Respondent Brown-Borhek, the credited testimony reveals that Del Nero on or about July 27 told employees that Lehigh and Ritter and Smith no longer had to deal with the Union and he made it clear that Brown-Borhek would not be the only company "stuck." He then set about to provide the climate that would most certainly guarantee that this would happen. Thus, he bargained individually with the employees and threatened them with termination if they refused to accept his proposal. Further, he directed the employees to the Labor Board which resulted in the filing of the decertification petition.

In these circumstances Respondents cannot rely on rejections due to their own misconduct to sustain their assertion that it had valid grounds for doubting the Union's majority status.[33] Respondents were under a continuing duty to meet and bargain with the Union and their refusal to do so was violative of Section 8(a)(5).[34]

Counsel for Respondents argues additionally and for

[33] *J. H. Paterson Company*, 217 NLRB No. 175; *Hoyt Motor Company, Inc.*, 136 NLRB 1043; *Weber's Bakery, supra, Daisy's Originals, Inc. of Miami, supra.*

[34] *J. H. Paterson Company, supra; Weber's Bakery, supra; Typoservice Corporation, supra; Royal Himmel Distilling Co., supra.*

the first time in his brief that the Union bargaining relationship is void *ab initio* on the basis that the most recent collective bargaining agreement and its predecessor agreements contained a construction industry union security clause. His reliance however on *Zanetti Riverdon Bus Lines* 128 NLRB 1389 is misplaced. The Board in *Zanetti* held that as the union-security provision failed to conform to Section 8(a)(1) and (3) of the Act, the contract could not serve as a bar to an election. It made no reference therein as to whether the bargaining relationship was unlawful.

In the instant case it cannot be determined conclusively whether Section 8(f) of the Act (construction industry proviso) applies to either of the companies involved herein. It was not raised in the answer, nor was the matter litigated, although Respondents had the opportunity to do so. In this connection it is noted that General Counsel's offer to place the most recent contract in evidence was objected to on the basis of relevance. While Respondent's Counsel makes the naked assertion that all previous contracts contained the same provision none of those agreements are in evidence nor were they offered. In any event the record does not demonstrate that employees were coerced into becoming union members. On the contrary, each of the unit employees strongly supported the Union and at various times engaged in picketing in support thereof. Under all the circumstances noting particularly that the matter had not been litigated, I find it inappropriate to consider this defense at this stage of the proceeding. See *Printing Utilities Branch of New York typo-*

graphical Union No. 6 (Pandick Press Inc), 228 No. 183.[35]

IV. The Effect at the Unfair Labor Practices Upon Commerce

The activities of Respondents set forth above in Section III, occurring in connection with the operations described in Section I, above, have a close intimate and substantial relationship to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

It will be recommended that Respondents be ordered to cease and desist from engaging in the unfair labor practices found herein and take certain affirmative action, as provided in the recommended Order below, designed to effectuate the policies of the Act.

Conclusions of Law

1. Respondents Lehigh and Brown-Borhek are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. All truck drivers, mobile lumber handling equipment operators, helpers and yardmen, excluding super-

[35] In view of the foregoing finding and noting that the Boards Rules and Regulations contain no provision for the filing of Reply Briefs, I have denied General Counsel's motion for permission to file said Reply Brief. See fn. 1 above.

visors as defined in the Act employed by members of Lehigh Valley Lumbermen's Association [36] including employees employed by Respondent Lehigh and Respondent Brown-Borhek constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein the Union has been the exclusive bargaining representative of all the employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondents violated Section 8(a)(1) of the Act by (a) threatening that it would not reemploy employees who engaged in a strike; (b) threatening employees that it would not sign a contract; (c) soliciting employees to withdraw their membership from the Union; (d) promoting decertification proceedings; (e) promising employees increased wages and other benefits, to induce them to abandon their allegiance to the Union.

6. Respondents violated Section 8(a)(5) and (1) of the Act by (a) bargaining directly with employees in contravention of their obligation to meet and bargain with the Union; (b) withdrawing recognition of the Union.

7. Respondents did not engage in unfair labor practices other than those found herein.

[36] The record does not reveal whether Ritter and Smith company timely withdrew from the association. The standing with regard to Ritter and Smith company was not litigated and it does not appear that there were any other employer members of the association at the time the last contract expired.

Upon the foregoing findings of fact, conclusions of law and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[37]

ORDER

A. Respondent, Lehigh Lumber Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with the Union as the collective bargaining representative of the employees in the above-described bargaining unit.

(b) Bargaining directly with employees with respect to their wages or terms and conditions of employment instead of through their exclusive collective bargaining representative.

(c) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act, as amended, by (1) suggesting and promoting the filing of Union decertification petitions by employees; (2) threatening that employees who engage in a strike will not be reemployed; (3) threatening that it will not sign a contract with the Union and (4) promising its employees increased wages and other benefits to induce them to abandon their allegiance to the Union.

[37] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self organization, to form, join, or assist labor organizations, to bargain through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the Act, or to refrain from any and all such activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union, as the sole and exclusive representative of its employees in the above-described unit with respect to rates of pay, hours of employment and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Allentown facility copies of the attached notice marked "Appendix A."[38] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent Lehigh's representative, shall be posted by Respondent Lehigh immediately upon request thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to

[38] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

employees are customarily posted. Reasonable steps shall be taken by Respondent Lehigh to insure that the notices are not altered, defaced, or covered by other material.

(c) Notify the Regional Director for Region 4, in writing within 20 days from the date of this Decision, what steps have been taken to comply herewith.

B. Respondent, Brown-Borhek Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with the Union as the collective-bargaining representative of the employees in the above-described bargaining unit.

(b) Bargaining directly with employees with respect to their wages or terms and conditions of employment instead of through their exclusive collective-bargaining representative.

(c) Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act, as amended, by (1) suggesting, encouraging and assisting the filing of Union decertification petitions by employees; (2) threatening employees with discharge if they refuse to abandon their allegiance to the Union; (3) threatening that it will not sign a contract with the Union.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self organization, to form, join, or assist labor organizations, to bargain through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the Act, or to refrain from any and all such activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union, as the sole and exclusive representative of its employees in the above-described unit with respect to rates of pay, hours of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Bethelehem facility copies of the attached notice marked "Appendix B." Copies of the said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent Brown-Borek's representative, shall be posted by Respondent Brown-Borhek immediately upon request thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Brown-Borhek to insure that the notices are not altered, defaced, or covered by other material.

(c) Notify the Regional Director for Region 4, in writing within 20 days from the date of this Decision, what steps have been taken to comply herewith.

Dated, Washington, D. C. April 26, 1977

IRWIN KAPLAN

Irwin Kaplan
Administrative Law Judge

"APPENDIX A"

ORM NLRB-4727
(9-69)

NOTICE TO
EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES
GOVERNMENT

After a trial in which all sides have presented evidence, it has been found that we have violated the National Labor Relations Act in certain respects. To correct and remedy these violations, we have been directed to take certain actions and to post this notice.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act, as amended by:

(1) Threatening employees that WE WILL NOT sign a contract with Local 773, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America;

(2) Threatening employees that if they engage in a strike they will not be reemployed;

(3) Promising employees increased wages and other benefits to induce them to abandon their allegiance to Local 773 International Brotherhood of

Teamsters, Chauffeurs, Warehousemen, and Helpers of America;

(4) Encouraging or promoting a decertification petition to be filed by our employees against Local 773, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America;

(5) Bargaining unilaterally with employees in contravention of our obligation to bargain with Local 773, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the sole and exclusive representative of our employees, with respect to wages, hours, and terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the Act, or to refrain from any and all such activities.

WE WILL, upon request, bargain collectively with Local 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; as the sole exclusive bargaining representative of our employees in the unit described below and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

All truck drivers, mobile lumber handling equip-

ment operators, helpers and yardmen, excluding supervisors as defined in the Act.

LEHIGH LUMBER COMPANY
(Employer)

Dated By
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William J. Green Jr., Federal Building, 600 Arch Street, Suite 4400, Philadelphia, Pennsylvania 19106, Telephone (215) 597-7643.

"APPENDIX B"

FORM NLRB-4727
(9-69)

NOTICE TO
EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES
GOVERNMENT

After a trial in which all sides have presented evidence, it has been found that we have violated the National Labor Relations Act in certain respects. To correct and remedy these violations, we have been directed to take certain actions and to post this notice.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act, as amended, by:

(1) Threatening employees that we will not sign a contract with LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA;

(2) Threatening employees with discharge if they refuse to abandon their allegiance to LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA;

(3) Promising employees increased wages and other benefits to induce them to abandon their allegiance to LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA;

(4) Encouraging or assisting our employees to file a decertification petition against LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA;

(5) Bargaining unilaterally with employees in contravention of our obligation to bargain with LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the sole and exclusive representative of our employees, with respect to wages, hours, and terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the Act, or to refrain from any and all such activities.

WE WILL, upon request, bargain collectively with LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the sole and exclusive bargaining representative of our employees in unit described below and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

All truck drivers, mobile lumber handling equipment operators, helpers and yardmen, excluding supervisors as defined in the Act.

BROWN-BORHEK COMPANY
(Employer)

Dated By
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William J. Green Jr., Federal Building, 600 Arch Street, Suite 4400, Philadelphia, Pennsylvania 19106, Telephone (215) 597-7643.

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